

APPEAL NO. 171136
FILED JULY 6, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 23, 2017, with the record closing on April 5, 2017, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) sustained a compensable injury on (date of injury); that the claimant had disability due to the compensable injury of (date of injury), from February 12 through February 26, 2016, and from March 4 through March 18, 2016; and that the claimant had no disability due to the (date of injury), compensable injury from February 27 through March 3, 2016, or from March 19, 2016, through April 5, 2017.

The claimant appealed that portion of the hearing officer's disability determination decided against him as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The respondent (carrier) responded, urging affirmance.

The hearing officer's determinations that the claimant sustained a compensable injury on (date of injury), and had disability during the periods from February 12 through February 26, 2016, and from March 4 through March 18, 2016, were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The claimant testified that he injured his left arm biceps tendon on (date of injury), while pushing a heavy laundry cart. The medical records in evidence reflect that the claimant sought treatment on February 12, 2016, and was diagnosed with a left arm biceps tendon rupture on February 19, 2016. This diagnosis was confirmed by MRI testing on February 29, 2016, which revealed a biceps tendon rupture with approximately 7.5 centimeters distal retraction. The claimant testified that he has been referred for an orthopedic consult but has not been seen due to the carrier's dispute of the claim. The claimant further testified that he has been unable to perform his duties since the date of injury, has had no earnings since February 12, 2016, and has not received treatment for his injury since March 4, 2016.

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that he had disability as defined by

Section 401.011(16). Disability is a question of fact to be determined by the hearing officer. See Appeals Panel Decision (APD) 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of his disability; only that it was a producing cause. APD 042097, *supra*.

The hearing officer found the claimant had disability from February 12 through February 26, 2016, and from March 4 through March 18, 2016; however, she found that the claimant did not have disability for the six-day period beginning February 27 and continuing through March 3, 2016, and the period beginning on March 19, 2016, and continuing through the date of the CCH on April 5, 2017. In evidence are three Texas Workers' Compensation Work Status Reports (DWC-73s) which restrict the claimant from returning to work for the disability periods determined by the hearing officer. However, there is no evidence that the claimant was ever released to return to work in any capacity. A medical record in evidence dated March 4, 2016, notes an MRI finding of a left biceps tendon rupture.

In her discussion, the hearing officer noted that one of the witnesses testified that she observed the claimant performing his duties normally and with no apparent problems on (date of injury), and that the claimant had told the witness that he injured his arm the previous day. In describing why she found the claimant's testimony to be more credible, the hearing officer stated "[i]t is somewhat difficult to believe that the [c]laimant was performing these physically demanding tasks normally with a ruptured biceps tendon in his left arm." In fact, the claimant testified that he has been unable to perform his pre-injury job duties since the date of the injury. While we have often held that a claimant can move in and out of disability (see APD 031317, decided June 25, 2003), the claimant's uncontroverted testimony was that he had been unable to perform his duties since the date of injury and that an orthopedic consult had been requested but has not occurred due to denial of the claim.

In view of the applicable law and the evidence presented, we conclude that the hearing officer's determination that the claimant had no disability from February 27 through March 3, 2016, or from March 19, 2016, through April 5, 2017, is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, we reverse the hearing officer's decision that the claimant had no disability due to the compensable injury of (date of injury), from February 27 through March 3, 2016, or from March 19, 2016, through April 5, 2017, and render a new decision that the claimant had disability due to the compensable injury of (date of

injury), from February 27 through March 3, 2016, and from March 19, 2016, through April 5, 2017.

The true corporate name of the insurance carrier is **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

K. Eugene Kraft
Appeals Judge

CONCUR

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge